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Interpreting International Human Rights Standards -  
Treaty Body General Comments as a Chisel or a Hammer

Kasey L McCall-Smith♦

1 Introduction

Human rights treaties are standard-setting yet these standards are open-textured and evolutionary; therefore interpretative tools must be engaged in order to flesh out the true extent of states' obligations, particularly as these obligations evolve to reflect rights in the modern world. The human rights treaty bodies embedded in each of the UN human rights treaties are comprised of experts in the field specific to each treaty and represent a unique feature of the core treaties in that they are the primary interpreters of the treaties at the international level. Human rights treaty bodies have contributed a great deal to the development of measurable international human rights obligations. Through the functions confirmed by their respective treaties, treaty bodies have a range of options by way of which they can inform States Parties about the evolving nature of human rights protection. From issuing general comments, to appraising states' periodic reports or reaching final views on individual communications – what will be referred to collectively throughout this chapter as 'jurisprudence' – there is no lack of soft law to be found. Though many states often ignore treaty body jurisprudence, there is unmistakeable evidence that it is creeping into the domestic realm by virtue of increasing reference to this jurisprudence in domestic court opinions and policy debates. The persisting question is whether the use

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of treaty body jurisprudence at the domestic level refines or distorts the development of universal human rights standards.

Human rights treaty bodies are invested by their respective treaties with the competence to assess the implementation of treaty obligations. As will be examined below, the various methods by which treaty bodies may engage in this assessment are outlined in each treaty and the competences of each supervisory mechanism varies, albeit only slightly. The jurisprudence produced through the exercise of these competencies is a form of soft law that can respond to the legal and social environment more flexibly and guide interpretation and state practice in the international sphere. In other words, the soft law produced by the treaty bodies is norm-filling.<sup>1</sup> However, it is when these soft instruments are introduced into domestic legal systems that they are truly tested, especially when the instruments are used in a peculiar manner.<sup>2</sup> The impact of these references sustains the concept of soft law put forward by this volume – that treaty body instruments contain rules which are in the process of incubation.<sup>3</sup> The judicial practices surveyed herein suggest that these incubating rules – or more accurately, interpretations of the minimalist binding rules found in the treaties themselves – are gaining traction. It also supports the oft-repeated maxims that human rights treaties do not exist in a vacuum<sup>4</sup> and are ‘living instruments’<sup>5</sup> which makes evolutionary interpretation necessary.

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<sup>1</sup> Thomas Gammeltoft-Hansen, Stephanie Lagoutte and John Cerone, ‘Introduction: Tracing the Roles of Soft Law in Human Rights’, this volume (Nov 14 draft, p. 10 – TBC).

<sup>2</sup> The same observation can be said of domestic court application of treaty interpretation rules generally. See, e.g. Helmut P. Aust, Alejandro Rodiles and Peter Staubach, ‘Unity or Uniformity? Domestic Courts and Treaty Interpretation’, *Leiden Journal of International Law* 27, no. 1, (2014) 75-112, p. 84.

<sup>3</sup> See Chapter 1, this volume. (p. TBC).

<sup>4</sup> For example, *Hassan v. United Kingdom*, 29750/09 [2014] ECHR 1162 (16 Sept 2014), para. 77; *Cyprus v. Turkey*, 25781/94 [2014] ECHR 478 (12 May 2014), para. 23; *Marguš v Croatia*, 4455/10 [2014] ECHR 523 (27 May 2014), para. 129; *Neulinger and Shuruk v. Switzerland* [2010] ECHR 1053 (6 July 2010), para. 131; Françoise Hampson, Working paper submitted pursuant to Sub-Commission decision 1998/113, UN Doc. E/CN.4/Sub.2/1999/28 (1999) (1999 Working paper), para. 13.

<sup>5</sup> *Jaloud v. The Netherlands*, 47708/08 [2014] ECHR 1292 (20 November 2014), para. 121; *O’Keeffe v.*

This chapter explores the introduction of treaty body jurisprudence into domestic legal systems. Specifically, it considers the use of general comments.<sup>6</sup> The contribution begins with a brief introduction of the treaty bodies as it is the nature of these bodies that warrants consideration of their jurisprudence as a legitimate interpretative tool. It will then deliver an overview of references to treaty body general comments in the case law across a selection of jurisdictions, including the UK and South Africa, as well as Europe as a supranational jurisdiction. Finally, it will analyse the impact that these domestic engagements with treaty body jurisprudence have on the interpretation of international human rights standards. It will consider whether the outcome of a court case that has relied upon general comments contributes to or detracts from the strength of the treaty body outputs. It is posited that in instances where rights are progressively recognised for protection, general comments serve as a chisel to aid in refining rights. In instances where the judiciary disregards or distorts treaty body guidance, it is suggested that the general comments act more as a hammer that weakens a particular right. Thus it is extremely important that treaty bodies take special care when drafting their opinions, comments and reports, therefore some attention will be given to the issue of treaty body drafting.

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*Ireland*, 35810/09 [2014] ECHR 96 (28 January 2014), concurring opinion of Judge Ziemele, para.11; *X and Others v. Austria*, 19010/07 [2013] ECHR 148 (19 February 2013), para.139; *Loizidou v. Turkey (Preliminary Objections)* [1995] 20 EHRR 99, para. 71; Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007), p. 155; David Kinley and Rachel Chambers, 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law' (2006) 6 Human Rights Law Review 447, fn. 176.

<sup>6</sup> Throughout this chapter the term 'general comments' will be used collectively in reference to both general comments and general recommendations as in practice both terms refer to the same form of treaty body jurisprudential product. See for example, International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171, 16 Dec. 1966, Art. 40(4): 'The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such *general comments* as it may consider appropriate, to States Parties' (emphasis added). The Convention on the Elimination of All forms of Discrimination against Women (CEDAW) 1249 UNTS 13, 18 Dec. 1979, Art. 21(1): 'The Committee shall...report annually to the General Assembly of the United Nations on its activities and may make suggestions and *general recommendations* based on the examination of reports and information received from the States Parties' (emphasis added). Similar statements can be found in each of the core UN human rights treaties discussed in this paper.

As an interpretative tool, treaty body general comments enrich the understanding of human rights obligations, and it is clear that state organs are increasingly willing to entertain these views in order to better define human rights at the domestic level. As an increasingly authoritative form of soft law, general comments are shaping the way in which domestic courts interpret international human rights standards. What is not clear is whether the unwieldy nature of domestic interpretations bolster or undermine these standards.

## 2 Human Rights Treaty Bodies

Human rights treaty bodies are the embedded international institutions of the UN human rights treaties and the primary monitoring and enforcement mechanisms of the texts' obligations. All of the treaty bodies review periodic reports and are authorised to issue general comments<sup>7</sup> as they may consider appropriate. Essential to the perceived legal value of the treaty bodies' jurisprudence is the independent, expert, non-political status of the bodies.

Each of the treaty bodies' membership election processes is crafted to guarantee that an unbiased authority exercises oversight over the universal human rights treaties. The treaty body election guidelines seek to achieve equitable geographical distribution in addition to representation of different types of civilisations and legal systems among the States Parties, which helps ensure that no one region or culture dominates. Essential to the execution of their duties is the requirement that members act in their personal capacities, not as representatives of their governments, despite being nominated by them.

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<sup>7</sup> *Ibid.*

It has been suggested that experts working together in the international context ‘can facilitate the resolution of global policy issues by narrowing the range within which political bargains could be struck’.<sup>8</sup> For example, typical members of the CEDAW Committee have been active in the areas of gender equality and women’s issues and this is reflected by their curriculum vitae. Picciotto observed that ‘delegating specific issues to specialists who would deal with them in a depoliticized fashion...is a means of implementing policies that have been formulated through political processes...[and] understood as a response to the problems of governing ever more complex societies’<sup>9</sup>. The treaty bodies exist to ensure specific rights are implemented into a variety of social, cultural and political jurisdictions. The combination of a highly varied membership and specialists in the field, both mandated by committee election guidelines, provides an essential element of legitimacy to the work of the treaty bodies. Without the treaty bodies supervising implementation, human rights treaties would be in danger of becoming merely aspirational.

### 3 Treaty Body Jurisprudence

States Parties have a duty of good faith to cooperate with the treaty body as recognised by general principles of treaty law.<sup>10</sup> It is essential that treaty bodies interpret the obligations in light of the domestic situation on the ground, including introduction of new law or reconciliation with existing law. The interaction between a treaty body and a State Party is very much an exclusive, interactive process and is best understood as an on-going dialogue. Thus, treaty bodies function primarily on a

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<sup>8</sup> Sol Picciotto, ‘Constitutionalizing Multilevel Governance?’ *International Journal of Constitutional Review* 6, no. 3-4, (2008): 457-479, p. 459.

<sup>9</sup> *Ibid.*

<sup>10</sup> Vienna Convention on the Law of Treaties (Vienna Convention), 1155 UNTS 331, 23 May 1969, Art. 26. This is also typically noted within each of the treaty texts.

bilateral plane.<sup>11</sup> The exception to this rule is the practice of issuing general comments or recommendations, which are intended specifically to provide useful information to all States Parties regarding how convention obligations should be implemented.

General comments often are viewed as the ‘attendant product’ to guide states on the scope of treaty obligations.<sup>12</sup> In light of the concerns of many states about interference with state sovereignty, the treaty bodies’ obligations to make general comments is possibly the strongest language available to indicate that they are singularly responsible for guiding states’ compliance with a treaty despite the fact that this practice has been repeatedly harpooned by states as an over-extension of their powers.<sup>13</sup> General comments address the entirety of States Parties, rather than individual states as with the communications or periodic reporting procedures, and they range from mundane matters of internal treaty body functioning to elucidating the appropriate means of protecting particular rights.<sup>14</sup>

### 3.1 General comments - evolving practice

The practice of issuing general comments began in 1981 with the Human Rights Committee pursuant to ICCPR Article 40.<sup>15</sup> Eight of the nine core UN human rights

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<sup>11</sup> Sir Nigel Rodley, ‘United Nations Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights: Complementary or Competition?’ *Human Rights Quarterly* 25, no. 4 (2003): 882-908, p. 887.

<sup>12</sup> *Ibid.*, 906.

<sup>13</sup> See, for example, *Observations by the United States of America and the United Kingdom on General Comment No. 24(52)*, UN Doc. A/50/40 (1995); reprinted in *Human Rights Law Journal* 16, (1995): 423.

<sup>14</sup> See Rodley, *supra* note 11, at p. 888; Henry J. Steiner, ‘Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?’ in Philip Alston and James Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, Cambridge 2000): 15-53, p. 22.

<sup>15</sup> For a more complete overview of the history of general comments see Helen Keller and Leena Grover, ‘General Comments of the Human Rights Committee and their Legitimacy’ in Helen Keller and Geir Ulfstein (eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, Cambridge, 2012): 116-198, pp. 121-27; Philip Alston, ‘The Historical Origins of the Concept of ‘General Comments’ in Human Rights Law’ in Laurence Boisson de Chazournes and Vera Gowlland-Debbas (eds.), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-saab* (2001), 763, reprinted in Henry J. Steiner, Philip Alston and Ryan Goodman,

treaty bodies have issued a combined 150 general comments on various aspects of their respective treaties.<sup>16</sup> These include the CERD Committee<sup>17</sup> (35 comments), the Human Rights Committee (HRC)<sup>18</sup> (35 comments), the ESCR Committee<sup>19</sup> (21 comments), the CEDAW Committee<sup>20</sup> (33 comments), the CAT Committee<sup>21</sup> (3 comments), the CRC Committee<sup>22</sup> (19 comments, including one draft comment published June 2015), the Committee on Migrant Workers<sup>23</sup> (2 comments), and the newest treaty body to commence operation, the Committee on the Rights of Persons with Disabilities (2 comments). Most recently, the CEDAW Committee adopted General Comment 33 on women's access to justice in August 2015.<sup>24</sup>

The debate amongst observers of the UN human rights regime assigns disparate levels of importance to these comments as a form of soft law. Some view them as authoritative interpretations of the treaties while others view them as unsystematic and unfounded statements deserving no recognition in the law.<sup>25</sup> Though there is far from consensus on the determination of exactly what legal weight general comments carry, it is evident that they have influenced the protection of human rights and enriched the human rights dialogue.

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*International Human Rights in Context: Law, Politics, Morals* (3<sup>rd</sup> ed.) (Oxford University Press, Oxford, 2008), p. 873 *et seq.*

<sup>16</sup> As of 3 January 2016.

<sup>17</sup> The treaty body established by Art. 8 of the Convention on the Elimination of all forms of Racial Discrimination (CERD), 669 UNTS 195, 21 Dec. 1965.

<sup>18</sup> The treaty body established by Art. 28, ICCPR.

<sup>19</sup> The treaty body overseeing the International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3, 26 Dec. 1966, was established by ECOSOC Resolution 1985/17, 28 May 1985. Prior to the resolution, reports were submitted directly to the UN Economic and Social Council pursuant to Article 16 of the Covenant.

<sup>20</sup> The treaty body established by Art. 18 of CEDAW.

<sup>21</sup> The treaty body established by Art. 17 of the Convention on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 465 UNTS 85, 10 Dec. 1984.

<sup>22</sup> The treaty body established by Art. 43 of the Convention on the Rights of the Child (CRC), 1577 UNTS 3, 20 Nov. 1989.

<sup>23</sup> The treaty body established by Art. 72 of the Convention for the Protection of the Rights of Migrant Workers and Their Families (CRMW), 2220 UNTS 3, 18 Dec. 1990.

<sup>24</sup> CEDAW Committee, *General Comment No. 32 on women's access to justice*, UN Doc. CEDAW/C/GC/33 (2015). General Comment information updated 3 January 2016.

<sup>25</sup> See Keller and Grover, *supra* note 15, at pp. 118-19.



### 3.1.1 Guiding principles on general comments

The guiding principles on formulating comments, an amalgamation of the procedure and practice that has developed since 1981, indicate that they should be directed to States Parties, promote co-operation between States Parties, summarise the experience the treaty body has gained reviewing the States Parties' periodic reports and focus the attention of the States Parties on matters that would improve implementation of the treaty obligations.<sup>26</sup> They are intended to provide 'significant normative guidance' on aspects of implementation of the treaty.<sup>27</sup> Furthermore, the subjects should be limited to those involving implementation of obligations related to periodic reports, guarantee of the treaty rights, article specific questions or suggestions relating to cooperation between States Parties.<sup>28</sup> General comments are most often expository in style and the language typically reflects the expertise of the treaty body in dealing with the treaty obligations under its supervision.<sup>29</sup> In maintaining a formula, albeit a vague one, it is intended that states will more readily accept comments adhering to the guidelines.

The lack of a clear definition of 'general comment/recommendation' in the treaties coupled with the vague guidelines outlines has resulted in diverse subject matters ranging from implementation of CERD Article 6<sup>30</sup> (access to effective remedy) to the practice of reservations to the ICCPR<sup>31</sup> and CEDAW<sup>32</sup>. What is important to reiterate is that the treaty bodies are carrying out their duties under the

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<sup>26</sup> See Alston, *supra* note 15, at p. 876.

<sup>27</sup> Keller and Grover, *supra* note 15, at p. 124.

<sup>28</sup> Alston, *supra* note 15, at p. 876.

<sup>29</sup> See, for example, Rodley, *supra* note 11, at pp. 888-89, discussing the HRC's general comment on ICCPR Art. 7.

<sup>30</sup> See CERD Committee, *General Recommendation No. 26: Article 6 of the Convention*, UN Doc. A/55/18, annex V (2000).

<sup>31</sup> See HRC, *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.6, 04 Nov.1994.

<sup>32</sup> See CEDAW Committee, *General Recommendation No 4: Reservations*, UN Doc. HRI/GEN/1/Rev.9, vol. II (2008).

treaty texts. The issue of transmitting comments, as with many aspects in the human rights regime, was left undefined intentionally so that practices could develop as the human rights movement spread. However, it is now clear that the practice is firmly established and accepted by the majority of States Parties.<sup>33</sup>

### 3.2 General comments - points of contention

The issuing of general comments has traditionally been the point at which states articulate opposition to treaty bodies as they often view the practice as going beyond the treaty into the realm of developing new law.<sup>34</sup> General comments air the problems that surface during the review of periodic reports and though they are not state-specific, the fact that reports and comments are publicly available lends to the easy association of themes and, therefore, may be embarrassing to states with less than commendable rights records. This, in turn, causes offended States Parties to argue the lack of legal basis for the comment.<sup>35</sup> Alston appropriately identified general comments as a ‘double-edged sword’ for States Parties who launch attacks criticising their legitimacy as it not only draws attention to their disagreement with the opinion and authority of the commenting committee, but also highlights the committee’s interpretation of the controversial right, thus establishing a benchmark for other States Parties.<sup>36</sup>

Much of the opinion surrounding general comments has turned on the drafting and the process by which the comment is adopted;<sup>37</sup> comments specifically derived

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<sup>33</sup> Geir Ulfstein, ‘Law-making by Human Rights Treaty Bodies’ in Rain Liivoja and Jarna Petman (eds.), *International Law-Making: Essays in Honour of Jan Klabbers* (Routledge, 2014): 249-258, p. 252.

<sup>34</sup> Keller and Grover, *supra* note 15, at p. 118.

<sup>35</sup> For example, *Observations by the Governments of the United States and the United Kingdom on Human Rights Committee General Comment No. 24 (52) relating to reservations*. UN Doc. A/50/40 (1995); reprinted in 16 Human Rights Law Journal 423 (1995).

<sup>36</sup> Alston, *supra* note 15, at p. 763, and p. 874 of reprinted version.

<sup>37</sup> Keller and Grover, *supra* note 15, at p. 119.

from treaty documents have met far less criticism than those that are more creative with the execution of a treaty body's remit. Examples of both can be found in the 2008 General Comment 33<sup>38</sup> of the HRC, which deals with States Parties' obligations pursuant to the Optional Protocol<sup>39</sup> to the ICCPR (OP-ICCPR). The HRC notes that under Article 2 of the OP-ICCPR that a State Party is obliged to provide the author of a complaint with an effective remedy when the Committee determines that there has been a violation of the ICCPR. By grounding their statement in the treaty text, States Parties are reminded of the obligations to which they have agreed in becoming a party to the Covenant. Paragraph 19, by contrast, refers to the HRC's rules of procedure as a basis for implementing interim measures where it is thought that irreparable harm is likely to occur before the Committee is able to develop its final views on the complaint. Though linked back to its purpose under the OP-ICCPR and obviously an important tool, using the rules of procedure as a basis for obliging a state to comply with a Committee decision is far weaker than using the actual obligation to which the state has subscribed.

### 3.3 Summary

A mounting hazard for states, which is equally a windfall for human rights protection, is that treaty body jurisprudence often is viewed as a form of developing law and increasingly is being cited by domestic courts and regional human rights organs, thus incorporating this jurisprudence into the corpus of case law and moving it to a less

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<sup>38</sup> HRC, *General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, UN Doc. CCPR/C/GC/33 (2008).

<sup>39</sup> HRC General Comment 34 notes at paragraph 3: 'The preamble to the Optional Protocol states that its purpose is "further to achieve the purposes" of the Covenant by enabling the Human Rights Committee, established in part IV of the Covenant, "to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant." The Optional Protocol sets out a procedure, and imposes obligations on States parties to the Optional Protocol arising out of that procedure, in addition to their obligations under the Covenant.'

‘soft’ form of law, particularly in common law jurisdictions. This use of treaty body jurisprudence may be more appropriately referred to as ‘liquid’ law in the domestic context as it aids in filling the gaps in and among the hard law that governs rights assessment. In these situations, the legal opinion of a treaty body can be both validated by the court and lend legitimacy to existing and future treaty body opinions. It is to this phenomenon that this chapter will now turn.

#### 4 General Comments in Domestic Courts

There is a strong argument to rely heavily on the opinions of the treaty bodies as interpretative tools in light of the special nature of both the treaty bodies and the nature of the rights their constitutive treaties are designed to protect. It must be acknowledged, however, that as far as the codified rules of treaty interpretation are concerned, the 1969 Vienna Convention on the Law of Treaties does not mention the treaty-specific monitoring mechanisms. Treaty bodies had not begun to operate at the time the Vienna Convention was adopted thus it would have had no cause to address such mechanisms.<sup>40</sup> This underscores the point that international law and human rights law, particularly, are dynamic and evolving and thus updates must be considered in order to maintain a coherent system.

The following examines the increasing recognition of general comments as interpretative tools by a selection of domestic courts. The caveat, which must be set forth from the outset, is that the following is an extremely preliminary overview of the

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<sup>40</sup> Though the treaty bodies were functioning prior to the entry into force of the Vienna Convention in 1980. In its Guide to Practice on Reservations to Treaties the International Law Commission specifically recognises the role of treaty bodies in monitoring and determining issues related to human rights treaty interpretation, see Report of the International Law Commission on its 63<sup>rd</sup> session, Guide to Practice on Reservations with commentary, UN Doc. A/66/10/Add.1 (2011), 3.2 and 3.2.1. For an examination of this competence, see Kasey L. McCall-Smith, 'Reservations and the Determinative Function of the Human Rights Treaty Bodies', *German Year book of International Law* 54, (2011): 521-564.

case law derived from three distinct jurisdictions. It is by no means comparative between them, nor exhaustive in any way. Particularly, the following gives a perfunctory overview of general comments as introduced into the UK, South African and European systems.

#### 4.1 United Kingdom

The UK is party to CERD,<sup>41</sup> ICESCR,<sup>42</sup> ICCPR,<sup>43</sup> CEDAW,<sup>44</sup> CAT,<sup>45</sup> the CRC<sup>46</sup> and the CRPD.<sup>47</sup> Thus, opinions stemming from the associated treaty bodies should be acknowledged and observed ‘in good faith’ in accordance with the Vienna Convention on the Law of Treaties, though none of these treaties have been officially incorporated into UK law. The trend of referencing treaty body documentation in the UK began shortly after the adoption of the Human Rights Act<sup>48</sup> in 1998. It, however, has taken some time for the products of the treaty bodies to evolve into and become accepted as more mainstream interpretative tools in the UK domestic legal system. Since the inception of the UK Supreme Court, intermittent reference to the treaty bodies has increased and this has trickled down to lower courts in their efforts to maintain coherence with the rulings of the highest court.

Article 2 of the Human Rights Act 1998 largely shapes the assessment of human rights and the expansion of rights in the UK. Article 2 provides:

##### 2 Interpretation of Convention rights.

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<sup>41</sup> The UK signed on 11 Oct. 1966 and ratified on 7 Mar. 1969.

<sup>42</sup> The UK signed on 16 Sept. 1968 and ratified on 20 May 1976.

<sup>43</sup> The UK signed on 16 Sept. 1968 and ratified on 20 May 1976.

<sup>44</sup> The UK signed on 22 Jul. 1981 and ratified on 7 Apr. 1986.

<sup>45</sup> The UK signed on 15 Mar. 1985 and ratified on 8 Dec. 1988.

<sup>46</sup> The UK signed on 19 Apr. 1990 and ratified on 16 Dec. 1991.

<sup>47</sup> The UK signed on 26 Feb. 2009 and ratified on 7 Aug. 2009.

<sup>48</sup> Great Britain. *Human Rights Act 1998: Elizabeth II. Chapter 42.* (1998). London: The Stationery Office, ‘An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights.’

- (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—
- (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
  - (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
  - (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
  - (d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

Thus whilst it outlines specifically that UK courts must take into account the jurisprudence of the European Court of Human Rights and opinions of other European Convention on Human Rights organs, there is no direct reference to jurisprudence emanating from the UN treaty bodies. However, this omission has not prevented British courts from utilising treaty body jurisprudence in the course of interpreting human rights issues that come before them.

In the early months of 2014 the UK Supreme Court reflected on general comments in a handful of cases. For example, *Kennedy v the Charity Commission*<sup>49</sup> recounted the evolution of the freedom of expression under Article 10 of the ECHR and how it has been expanded to include access to information in order to facilitate expression, particularly in the context of a public watch-dog.<sup>50</sup> The Court noted that the European Court of Human Rights relied on General Comment No. 34 in which the

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<sup>49</sup> *Kennedy v the Charity Commission* [2014] 2UKSC 20, [2014] WLR 808.

<sup>50</sup> *Ibid.*, para. 186.

Human Rights Committee<sup>51</sup> (HRC) underscored that ‘the right of access to information includes a right whereby the media has access to information on public affairs.’<sup>52</sup> Thus the Supreme Court ‘confidently conclude[d] that a right to require an unwilling public authority to disclose information can arise under article 10’<sup>53</sup> because the right of access goes hand in hand with freedom of expression, as outlined in the HRC’s interpretation of Article 19 of the ICCPR. This does not mean that limitations cannot be put in place through legislation, such as those limitations established by the Freedom of Information Act. It, however, demonstrates that in the UK the domestic evaluation of the freedom of expression tracks the interpretation provided by the HRC in its general comment. This linkage strengthens and refines the shared universal dimensions of the right to free expression.

Examination of free movement protected by ICCPR Article 12 is a recurrent theme on which a multitude of UK courts have looked to the treaty bodies for guidance. For example, an administrative judge invoked the HRC’s General Comment No. 27 on Freedom of Movement in the 2010 *Agyeman* case.<sup>54</sup> The judge pointed out that despite the fact that the ICCPR was not incorporated into domestic law, the HRC’s interpretation of the Article 12 freedom of movement in paragraphs 19 and 21 of the general comment were rights flowing to British subjects by virtue of their citizenship.<sup>55</sup> Specifically, the focus was the deprivation of the right of a person to enter his own country. The dicta of the case recognised that this right is set forth in domestic, European and international law, though it is not an unfettered right. As outlined in the comment, the interference with an individual’s right to return to his

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<sup>51</sup> The Human Rights Committee is the monitoring mechanism attached to the ICCPR.

<sup>52</sup> HRC, *General Comment 34 – Article 19: Freedoms of Opinion and Expression*, UN Doc. CCPR/C/GC/34 (2011), para. 18.

<sup>53</sup> *Kennedy supra* note 49, para. 190.

<sup>54</sup> *Derrick Agyeman v. Secretary of State for Foreign and Commonwealth Affairs, Secretary of State for the Home Department*, CO/8185/2006, [2010] EWHC 2180 (Admin) (11 Aug. 2010), at para. 13.

<sup>55</sup> *Ibid.*, paras. 12-13.

country of residence may only be interfered with to the extent that is ‘reasonable in particular circumstances’.<sup>56</sup> In this case, the Court determined that the claimant in the case had to accept that the difficulties with which he dealt in relation to obtaining a new British passport. It reasoned that the difficulties were justified in light of the security concerns of the age in which we live, even for a British citizen returning home. Thus the general comment, once again, was used to refine the outer limits of a right by highlighting the restrictions that the state might legitimately employ in the protection of free movement.

Immigration and asylum actions are possibly the most frequent cases to invoke the opinions of the treaty bodies in the UK, but this is largely due to the frequency of such cases both at the administrative and higher court levels. In 2012, the UK Supreme Court examined *RT & KM (among others) v Secretary of State*<sup>57</sup>, a series of cases revolving around asylum seeking refugees from Zimbabwe who did not only claim not to support the current Zimbabwean regime but simply had no political views whatsoever. The applicants argued that if returned to Zimbabwe it would be necessary for them to lie and profess support for the regime in order to avoid persecution in light of the Zimbabwean authority’s view that ‘you are either with us or against us’.<sup>58</sup> The Court underscored that there was ‘no support in any of the human rights jurisprudence for a distinction between the conscientious non-believer and the indifferent non-believer’.<sup>59</sup> Thus, the Court determined that the claimants should not be denied asylum simply because they had no political views nor should the alternative to asylum be that the claimants live a lie in their home state simply to avoid persecution. In considering the exercise of the right to freedoms of thought,

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<sup>56</sup> HRC, *General Comment 27: Freedom of Movement*, UN Doc. CCPR/C/21/Rev.1/Add.9 (1999), para. 21.

<sup>57</sup> *RT & KM (among others) v Secretary of State* [2012] UKSC 38, [2012] 4 All ER 843.

<sup>58</sup> *Ibid.*, para. 44.

<sup>59</sup> *Ibid.*, para. 45, relying on *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596.



conscious and religion as well as the freedom of expression, the Court tracked the HRC's approach to these rights in General Comment No 22 on Article 18 (30 July 1993) and in General Comment No 34 on article 19 (12 September 2011).<sup>60</sup> By referencing the HRC jurisprudence spanning several decades, the UK Supreme Court demonstrates an appreciation for the evolving nature of the right and the multifaceted dimensions in which the right may be implicated.<sup>61</sup> It is clear that the Court worked to maintain a consistent interpretation of the rights involved by paying great deference to the rights as outlined in the HRC's comments. By utilising the HRC interpretation of the right to freedom of thought, conscious and religion the Court aids in building a broad consensus on the expansive nature of the right.

Continuing a long line of asylum and immigration cases specifically involving children, in early March of 2011 a Civil Court of Appeal judge found that five paragraphs of the CRC Committee's General Comment No. 6 on Treatment of Unaccompanied and Separated Children Outside their Country of Origin<sup>62</sup> were particularly relevant in *DS (Afghanistan)*.<sup>63</sup> The specificity with which the judge referred to the general comment left no room for questioning the importance of the comment as a tool for interpreting the validity of government actions. The previous month, the Supreme Court had noted in *ZH (Tanzania)* that the most relevant legislation to the question of the effects of deportation on a child was Article 3(1) of the CRC. Article 3(1) establishes the 'best interests of the child' as the primary consideration for all actions involving children.<sup>64</sup> Though a different child-related immigration/asylum issue was asked than in *DS (Afghanistan)*, both courts relied on

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<sup>60</sup> *Ibid.*, para. 33.

<sup>61</sup> HRC, General Comment No 22 on article 18 (30 July 1993); HRC, General Comment No 34 on article 19 (12 September 2011)

<sup>62</sup> CRC Committee, *General Comment No 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, UN Doc. CRC/GC/2005/6 (2005).

<sup>63</sup> *DS (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 305, para. 65.

<sup>64</sup> *ZH (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSC 4, para. 23.

the best of interests of the child derived directly from the CRC and elaborated upon by the CRC Committee's general comments.<sup>65</sup> Notably, the *ZH (Tanzania)* opinion also cited the CRC Committee's General Comment No. 6 and articulated that:

Exceptionally, a return to the home country may be arranged, after careful balancing of the child's best interests and other considerations, if the latter are rights-based and override best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the State or to the society. Non-rights based arguments such as those relating to general migration control, cannot override best interests considerations.<sup>66</sup>

With the Supreme Court recognising the CRC Committee's opinion, it is no wonder that the decision created a great ripple effect. Following on from *ZH (Tanzania)*, the *Mansoor* case, in a very similar fact pattern and relying heavily on that case, repeated the acceptance of CRC General Comment No. 6.<sup>67</sup> The *Mansoor* decision noted that the UK Supreme Court has adopted...

...the approach recommended by international bodies, including the general comments of the rights of the child and the UNHCR guidelines, to the extent that a rights-based approach must be brought into being in order to justify accumulation of factors which could be said to outweigh the best interests of the child as a primary consideration in these cases.<sup>68</sup>

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<sup>65</sup> *DS (Afghanistan)*, *supra* note 63, para. 22; *ZH (Tanzania) (FC)*, *supra* note 64, para. 23.

<sup>66</sup> *ZH (Tanzania) (FC)*, *supra* note 64, para. 27.

<sup>67</sup> *The Queen on the application of Mansoor v Secretary of State for the Home Department* [2011] EWHC 832 (Admin), para. 27, citing UN CRC, General Comment No 6 on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin, UN Doc. CRC/GC/2005/6 (2005), para. 86,

<sup>68</sup> *Ibid.*, para. 32.

Thus, the progeny of *ZH (Tanzania)* continues to reinforce the strength of treaty body general comments as an integral consideration for interpreting UK law, whether as some form of evolving law or as an interpretative tool.

The use of general comments by the UK judiciary presented here demonstrates that these treaty body products aid in developing a more complete picture of international human rights obligations. British courts do not always utilise the chisel approach. The *Agyeman* case could be viewed as diminution of rights in the restrictions it places on access to passports. However, human rights are not guaranteed unfettered exercise when a legitimate restriction is deemed necessary. The selection of cases above highlights the potential for a common interpretation of international human rights driven by treaty body general comments.

#### 4.2 South Africa

In 1995, a South African court opined in the *Makwanyane* case that both non-binding, as well as binding, international law ‘may be used as tools of interpretation’<sup>69</sup> in keeping with Section 39 of the state’s (now former) Constitution - which is reflected in the current Constitution, also in Article 39.<sup>70</sup> The 1995 decision provided a list of potential sources of international law including instruments produced by the HRC,<sup>71</sup> despite the fact that the state had not yet ratified the ICCPR. At present, South Africa is party to CERD,<sup>72</sup> ICCPR,<sup>73</sup> CEDAW,<sup>74</sup> CAT,<sup>75</sup> CRC,<sup>76</sup> CRPD<sup>77</sup> and the ICESCR<sup>78</sup>.

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<sup>69</sup> *S v. Makwanyane and Another*, 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665), para. 35.

<sup>70</sup> Article 39, para. 1, of the current Constitution of the Republic of South Africa reads as follows: ‘When interpreting the Bill of Rights, a court, tribunal or forum—;(b) must consider international law; and (c) may consider foreign law.’

<sup>71</sup> *Ibid.*, para. 35.

<sup>72</sup> South Africa signed on 3 Oct. 1994 and ratified on 10 Dec. 1998.

<sup>73</sup> South Africa signed on 3 Oct. 1994 and ratified on 10 Dec. 1998.

<sup>74</sup> South Africa signed on 29 Jan. 1993 and ratified on 15 Dec. 1995.

<sup>75</sup> South Africa signed on 29 Jan. 1993 and ratified on 10 Dec. 1998.

<sup>76</sup> South Africa signed on 29 Jan. 1993 and ratified on 16 Jun. 1995.

Since the passage of the 1996 South African Constitution<sup>79</sup> the Constitutional Court has been particularly willing to utilise general comments in an effort to interpret rights stemming from the Constitution's Bill of Rights (Articles 7-39). Interestingly, the South African courts for many years have tended to invoke general comments of the Committee on Economic, Social and Cultural Rights (ESCR Committee) most often despite only having ratified the ICESCR on 12 January 2015.

In 2000, the Constitutional Court employed relevant international law, including a general comment issued by the ESCR Committee, as a tool of interpretation when considering the socio-economic right of access to housing in *South Africa v. Grootboom*<sup>80</sup>. The Court incorporated paragraph 10 of General Comment No. 3 on The Nature of States Parties' Obligations into the opinion verbatim to establish that the 'minimum core obligation' is necessary to determine whether a state is in violation of its obligations under the ICESCR, as outlined by the ESCR Committee. The minimum core obligation was eventually determined to be outside the scope of the case.<sup>81</sup> The dicta, however, proved useful in subsequent examinations of alleged violations of economic and social rights. Many human rights observers took issue with the Court for its failure to employ a 'minimum essential level' of an economic, social and cultural right,<sup>82</sup> as outlined by the ESCR Committee

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<sup>77</sup> South Africa signed on 30 Mar. 2007 and ratified on 30 Nov. 2007.

<sup>78</sup> South Africa signed on 3 Oct. 1994 and ratified on 12 Jan. 2015.

<sup>79</sup> Adopted on 18 Dec. 1996 and became effective on 4 Feb. 1997.

<sup>80</sup> *South Africa v. Grootboom*, 2001 (1) SA 46 (CC) (4 Oct. 2000).

<sup>81</sup> 'There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a Court to enable it to determine the minimum core in any given context. In this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution. It is not in any event necessary to decide whether it is appropriate for a Court to determine in the first instance the minimum core content of a right.' *South Africa v. Grootboom*, *supra* note 80, p. 66.

<sup>82</sup> For example, Dennis Davis, 'Socio-economic rights in South Africa: The record of the Constitutional Court after Ten Years' *ESR Review* 5, no. 5, (2004): 3-7; Institute for Democracy in Africa (IDASA), 'The Women's Budget', Budget Brief No. 111, (October 2002), [http://oppenheimer.mcgill.ca/IMG/pdf/10-09\\_Fondements\\_Pleniere\\_Grootboom.pdf](http://oppenheimer.mcgill.ca/IMG/pdf/10-09_Fondements_Pleniere_Grootboom.pdf) (last accessed 3

in General Comment No. 3.<sup>83</sup> Effectively the opinion severed an essential component of the realisation of economic and social rights identified by the ESCR Committee, thereby inhibiting the development of a universal interpretation of the right to adequate housing.<sup>84</sup> The Court opted for a test of reasonable legislative (and other) measures within its available resources to progressively realise the right to housing. Whilst in many ways *Grootboom* was a major victory in the fight to have economic, social and cultural rights recognized and substantiated in a court of law, it is a sad note that eight years after Irene Grootboom's 'victory' she died in a shack in Cape Town without any indicia of her right to housing having been fulfilled. The realisation of the right was not achieved in part due to the state's failure to employ the ESCR Committee's outlined 'minimum essential level'.

The ESCR Committee has issued two general comments on the right to adequate housing. The Constitutional Court has employed both general comments in subsequent efforts to flesh out the duties imposed on the state by Article 26 of its Constitution, particularly in relation to displaced individuals. Article 26(1) of the Constitution provides that '[e]veryone has the right to have access to adequate housing.' The South African Constitutional right to 'access' adequate housing is somewhat different than the right as introduced by ICESCR Article 11(1). General Comment No. 7, The Right to Adequate Housing,<sup>85</sup> was utilised by the Constitutional Court in the 2009 *Joe Slovo Community*<sup>86</sup> forced evictions case. It drew upon the

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January 2015).

<sup>83</sup> ESCR Committee, *General Comment No. 3: The nature of States parties' obligations*, U.N. Doc. E/1991/23, annex III at 86 (1991) para. 10.

<sup>84</sup> It must be acknowledged, also, that the South African right is phrased 'right to *have access to* adequate housing' (emphasis added) whilst the international obligation is the 'right to adequate housing' which some argue are two different concepts.

<sup>85</sup> ESCR Committee, *General Comment No. 7: The right to adequate housing (art. 11 (1) of the Covenant): Forced evictions*, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), paras. 7, 16.

<sup>86</sup> *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and Others* (CCT 22/08) (2009).

treaty body's interpretation of appropriate measures to establish the obligation of the state to provide housing for those persons subject to a legitimate forced eviction.

[E]victions should not result in people being rendered homeless. And where the people affected by the eviction are unable to provide for themselves, the [government] must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.<sup>87</sup>

Comment No. 7 was also used to define the duty of the government, including procedural protections, when relocating people under South Africa's PIE<sup>88</sup> policy.<sup>89</sup> Previously, in *Mpange v. Sithole*,<sup>90</sup> the Court had relied upon the ESCR Committee's 1991 General Comment No. 4 on the Right to Adequate Housing<sup>91</sup> to examine the duties imposed on the state by Article 26 of its Constitution with respect to the right to adequate housing.<sup>92</sup> Particularly the *Mpange* Court noted the interrelatedness of adequate housing and other fundamental rights, such as human dignity, as the ESCR Committee outlined in General Comment No. 4.<sup>93</sup> Underscoring the relationship to human dignity is particularly important in light of the Constitutional Court's recognition of human dignity as the 'central value of the objective normative value system established by the Constitution.'<sup>94</sup> It also emphasized the ESCR Committee's stress on the need for effective domestic legal remedies in order to comply with

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<sup>87</sup> *Ibid.*, para. 32.

<sup>88</sup> Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE), Act 19 of 1998.

<sup>89</sup> *Residents of Joe Slovo Community, Western Cape v supra* note 86, paras. 36-37.

<sup>90</sup> *Mpange and Others v. Sithole* (07/1063) [2007] ZAGPHC 201 (22 Jun. 2007).

<sup>91</sup> ESCR Committee, *General Comment No. 4: The right to adequate housing (art. 11 (1) of the Covenant)*, UN Doc. E/1992/23 (1991), para. 8.

<sup>92</sup> *Mpange supra* note 90, at para. 51.

<sup>93</sup> *Ibid.*, para. 51.

<sup>94</sup> *Ibid.*, para. 53. On this point see Arthur Chaskalson, 'Human Dignity as a Foundational Value of our Constitutional Order', *South African Journal of Human Rights* 16 (2000): 193-206.

ICESCR obligations.<sup>95</sup> These references to general comments are a step forward; however, the South African experience highlights that domestic use of these soft law instruments does not always equate to the successful implementation of a universal minimum standard of human rights.

More recently, in April 2011, the Constitutional Court used HRC General Comment No. 3<sup>96</sup> and ESCR Committee General Comment No. 13<sup>97</sup> to frame the importance of and basic right to education. The comment further aided the Court's interpretation of a private party's obligation to not infringe the right of education under the Bill of Rights. In *Juma Musjid Primary School*<sup>98</sup> the Court established that the Member of the Executive Council for Education for KwaZulu-Natal, a representative of the government, failed to comply with the positive obligation to 'respect, protect, promote and fulfil'<sup>99</sup> the right to a basic education despite its recognised status as an empowerment right and 'the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.'<sup>100</sup> In this instance, the treaty bodies' interpretations helped consolidate the international minimum standards required to fulfil the right to education.

It is not only the South African Constitutional Court that has relied upon general comments in pursuit of abiding by Article 39 of the state's Constitution. In 2008, the High Court of South Africa relied upon ESCR Committee General

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<sup>95</sup> *Mpagne*, *supra* note 90, at para. 52.

<sup>96</sup> HRC, General Comment No. 3, *Article 2 Implementation at the National Level*, Doc HRI/GEN/1/Rev.1 at 4 (1994).

<sup>97</sup> ESCR Committee, General Comment No. 13, *The Right to Education*, UN Doc. E/C.12/1999/10 (1999).

<sup>98</sup> *Juma Musjid Primary School & Others v. Essay N.O. and Others* (CCT 29/10) [2011] ZACC 13 (11 April 2011).

<sup>99</sup> *Ibid.*, para. 45.

<sup>100</sup> *Ibid.*, para. 41, quoting the ESCR Committee, General Comment No. 13, UN Doc. HRI/GEN/1/Rev.9 (Vol. I).

Comment No. 15 on The Right to Water<sup>101</sup> - derived from Articles 11 and 12 - to determine that ‘the State is obliged to provide free basic water to the poor’<sup>102</sup> despite there being no express right to water under international or South African law.<sup>103</sup> This case exemplified the Court’s readiness to recognise the interrelatedness and indivisibility of human rights and the fact that gaps related to the realisation of rights must often be filled using all available tools of interpretation.

The courts of South Africa have firmly established the role of treaty body jurisprudence as an interpretative tool and indispensable source of law. Though the use of general comments has not consistently represented a step forward in the universal standard of certain rights addressed by the South African courts, progress definitely can be charted. As the courts tease out the true meaning of the protections provided in the South African Bill of Rights, the interpretative guidance provided by general comments, and other treaty body jurisprudence, will continue to be an unparalleled tool.

#### 4.3 Europe as a supranational jurisdiction

The European Court of Human Rights (ECtHR) was the quickest to consider treaty body jurisprudence as a supporting source in the course of evaluating complaints of human rights abuse. This swift uptake can be attributed to the prominence of the European Convention on Human Rights<sup>104</sup> (ECHR), to which all 47 Council of

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<sup>101</sup> UN Doc. HRI/GEN/1/Rev.9 (Vol. I).

<sup>102</sup> *S v Mazibuko* (A1246/2006) [2008] ZAGPHC 106 (18 April 2008), paras. 36-37, see specifically para. 40.

<sup>103</sup> *Ibid.*, para. 45. The right to water, as indicated in General Comment No. 15, is derived from Article 11 of the ICESCR, which enunciates a non-exhaustive list of rights that must be insured in order to uphold the right to an adequate standard of living. See ESCR Committee, General Comment No. 15: The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. HRI/GEN/1/Rev.9 (Vol. I), paras. 2-6.

<sup>104</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). 4 Nov. 1950, ETS No. 005, 213 UNTS 221, as amended by Protocol Nos. 11 (ETS No. 155) and 14 (CETS No. 194), entry into force 1 Jun. 2010.



Europe Member States subscribe. The ECHR has guided domestic European jurisdictions since its adoption in 1950. Both the Council of Europe and the European Union, which have an overlapping membership of 28 states, maintain human rights as a primary policy objective. Therefore, it is unsurprising that the ECtHR has often utilised the soft law promulgated by the treaty bodies in its efforts to normalise the interpretation of rights and aid in the development of universal human rights standards.

As the primary court of review human rights violations in Europe, the ECtHR has referred to the opinions of various treaty bodies on many occasions. The cases discussed here represent a sampling of those where a general comment was invoked as an interpretative tool. In 2014 the ECtHR applied HRC General Comment No. 20,<sup>105</sup> in concert with other international law, in *Marguš v Croatia*<sup>106</sup> to assess the issue of the right not to be tried for the same charges and the right to a fair trial in light of an amnesty granted to the claimant. Following General Comment No. 20, the ECtHR recognised that though some states have granted amnesties for acts of torture, such amnesties violate the duty of states under the ICCPR to investigate and prevent acts prohibited by ICCPR Article 7. Thus in this instance, the ECtHR utilised the general comment to reinforce the need to limit the use of amnesties in order to ensure justice for the victims of torture or other prohibited treatment. *Marguš* represents one of a growing line of cases focused on refining the prohibition against torture and the multifarious ways in which the breach of the right might be manifested.<sup>107</sup>

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<sup>105</sup> HRC, General Comment No. 20: Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment, Article 7, 30 September 1992 at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11) (last accessed 3 January 2016).

<sup>106</sup> *Marguš v Croatia*, ECtHR (GC) [2014] ECHR 523.

<sup>107</sup> For example, *Othman (Abu Qatada) v. United Kingdom* [2012] ECHR 56, which examined the extent of the prohibition against torture. In the case the Court explicitly referred to concluding observations, another form of soft law, by both the Committee Against Torture and the HRC, in addition to a General Comment, paras. 107-08, 147-51, 156, and 158.

The ECtHR examined the extent to which threats constitute torture in 2010 in *Gäfgen v. Germany*.<sup>108</sup> As part of its evaluation the Court referenced a 2001 report by the UN Special Rapporteur for the Commission on Human Rights. The report reminded governments that the prohibition of torture related also to acts that cause mental suffering, including intimidation and threats, as pointed out in HRC General Comment No. 20. It also referenced HRC General Comment No. 7<sup>109</sup> (which was replaced by No. 20) to confirm the importance of the principle of effective protection and remedy for victims of torture or ill-treatment, including the inadmissibility of statements or confessions obtained by torture or other prohibited treatment.<sup>110</sup> The impact of General Comment Nos. 7 and 20 continue to resonate in cases throughout both the Council of Europe and European Union systems.

In *Baka v. Hungary*,<sup>111</sup> the ECtHR sat in a unique position as it heard an application by one of its former members relating to the independence of the judiciary. The Court relied heavily on HRC General Comment No. 32 on the right to equality before courts and tribunals and to a fair trial to outline the international guidance on what ICCPR Article 14 required in the context of independence of the judiciary and protecting judges from political influence.<sup>112</sup> The ECtHR ultimately found that Baka's ECHR Article 10 rights had been violated. In doing so, the ECtHR confirmed an international standard for the independence of the judiciary.

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<sup>108</sup> *Gäfgen v. Germany*, 22978/05 [2010] ECHR 759 (1 June 2010).

<sup>109</sup> HRC, *General Comment No. 7: Torture or cruel, inhuman or degrading treatment or punishment*, 30 May 1982 at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11) (last accessed 3 January 2016).

<sup>110</sup> *Gäfgen v. Germany*, 22978/05 [2010] ECHR 759 (1 June 2010), paras. 67, 70-1.

<sup>111</sup> *Baka v. Hungary* (Chamber) [2014] ECHR 528.

<sup>112</sup> HRC, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32 (2007), paras. 19-21.

The 2005 *Hirst*<sup>113</sup> judgment referred to HRC General Comment No. 25(57)<sup>114</sup> which detailed the requirement that states provide detailed information on any legislation that was the basis of suspending the right to vote.<sup>115</sup> The case involved prisoners' voting rights in the UK and the Court ultimately held that the UK was in violation of ECHR Protocol No. 1, Article 3 due to the broad blanket ban depriving prisoners of the right to vote. In another 2005 case, *Öcalan v. Turkey*, the ECtHR recognised the findings of the HRC in *Reid v. Jamaica*, which were based on its General Comment No. 6: Article 6 (Right to Life)<sup>116</sup>, as 'international developments concerning the death penalty'.<sup>117</sup> Thus the Court noted the changing views of the international community at large as set forth by the HRC general comment.

A distinguishing feature of the ECtHR is its ability to stay on top of the large amount of information coming out of the treaty bodies and to employ it without delay. One reason for this may be the number of judges – currently four – sitting on the ECtHR that formerly served as members of a treaty body.<sup>118</sup> It could also be the increasing cross-fertilisation of information across international human rights mechanisms. Whatever the reason, the ECtHR has demonstrated a deft capacity to engage the jurisprudence of the treaty bodies in its navigation of international human rights standards.

For instance, the Court used the 2007 General Comment No. 10 of the CRC Committee and the 2008 General Comment No. 2 of the CAT Committee in the

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<sup>113</sup> *Hirst v. United Kingdom*, ECtHR (GC), No. 74025/01, judgment 6 Oct. 2005, para. 27.

<sup>114</sup> *Participation in Public Affairs and the Right to Vote*, UN Doc. CCPR/C/21/Rev.1/Add.7

<sup>115</sup> *Hirst*, *supra* note 111, at para. 27.

<sup>116</sup> HRC, *General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11) (last accessed 3 January 2016).

<sup>117</sup> *Öcalan v. Turkey*, ECtHR (GC), No. 46221/99, judgment 12 May 2005, para. 60.

<sup>118</sup> Judge Boštjan Zupančič was a member of the CAT Committee (1995-98); Judge Linos-Alexandre Sicilianos was a member of the CERD Committee (2002-09); Judge Helen Keller was a member of the HRC (2008-11); Judge Iulia Antoanella Motoc was a member of the HRC (2006-13).

November 2008 *Salduz v. Turkey*<sup>119</sup> judgment to elaborate the relevant law concerning legal assistance to minors in police custody. It expressly incorporated two paragraphs of the CRC Committee comment<sup>120</sup> and one from the CAT comment<sup>121</sup> to interpret the extent of Turkey's obligation to provide assistance, legal or otherwise, in cases involving juveniles and the general right of access to a lawyer while in police custody. Regarding general comments as interpretative tools, *Salduz* is particularly interesting in that it featured two comments that were issued after the commencement of the case, which highlights the evolving nature of the tools that are essential to rights protection.

The use of general comments quite often reflects the interrelatedness and indivisibility of human rights as recognised in a broad range of treaties. HRC General Comment No. 29: States of Emergency (Article 4)<sup>122</sup> was used in 2009 to assist in determining the legal standard used to measure when a state could claim a legitimate derogation to the ECHR. The applicants in the case alleged unlawful detention, which was countered by the UK with an argument that it was derogating from certain ECHR obligations (as outlined in the Anti-terrorism, Crime and Security Act 2001). Primary questions in the cases leading to the ECtHR hearing were the actual existence of a valid 'public emergency' and the duration of the derogation to Article 5 of the ECHR. As noted in the Comment No. 29, '[m]easures derogating from the provisions of the Covenant must be of an exceptional and temporary nature.'<sup>123</sup> The Court ultimately

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<sup>119</sup> (ECtHR) App. 36391/02, 27 Nov. 2008.

<sup>120</sup> CRC Committee, *General Comment No. 10: Children's rights in juvenile justice*, UN Doc. CRC/C/GC/10 (2007), paras. 49, 52.

<sup>121</sup> CAT Committee, *General Comment No. 2 : Implementation of article 2 by States parties*, UN Doc. CAT/C/GC/2 (2008), para.13.

<sup>122</sup> HRC, *General Comment No 29: State of Emergency (article 4)*, UN CCPR/C/21/Rev.1/Add.11CCPR/C/21/Rev.1/Add.11CCPR/C/21/Rev.1/Add.11CCPR/C/21/Rev.1/Add.11CCPR/C/21/Rev.1/Add.11 (2001).

<sup>123</sup> *Case of A and Others v. United Kingdom*, App. 3455/05, 19 Feb. 2009, citing HRC General Comment 29, para. 2.

held that despite there being a public emergency worthy of derogation and that the derogation was not of an unreasonable duration in keeping with accepted law, including General Comment No. 29, the ‘derogation measures were disproportionate in that they discriminated unjustifiably between nationals and non-nationals.’<sup>124</sup> Thus, it was necessary to mix and match the various international obligations and standards to get to the heart of the breach of the obligation.

The approach of the ECtHR in referencing a wide range of treaty body jurisprudence, as demonstrated in *Neulinger*, reinforces the common mantra that a human rights convention ‘cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law.’<sup>125</sup> The *Neulinger* decision relied upon HRC General Comments Nos. 17 and 19, among several other international documents to tease out the meaning of the ‘best interests of the child’<sup>126</sup> and the decision has resonated across many European states. The position of the ECtHR, as well as other supranational human rights courts, is unique in the potential for its decisions, and the reasoning articulated therein, to influence the states within its regulatory system. Giving pride of place to treaty body instruments as means of determining human rights standards at the European level strengthens the ‘soft’ nature of this jurisprudence and underscores its value as an interpretative tool.

## 5 Conclusion

It is clear that domestic and supranational judicial opinions are referencing the general comments of the human rights treaty bodies. Whether introduced by zealous human rights defenders, NGO amicus briefs or the judges themselves, it cannot be denied that the interpretations of human rights conventions by the treaty bodies are gaining

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<sup>124</sup> *Ibid.*, para. 181,190.

<sup>125</sup> *Neulinger v Switzerland* (2010) 28 BHRC 706, para. 131.

<sup>126</sup> *Ibid.*, paras. 49-56.

traction in domestic courts. What legal value attaches to the comments in light of this phenomenon is less clear. This is particularly true when the comments are employed to achieve different aims than the treaty body originally intended or where a court opts not to adopt the treaty body's approach.

In some instances the use of general comments is norm-filling and aids in refining the universal interpretation of human rights. In others, a court's failure to follow the reasoning of the treaty body suggests that the right is subject to alternative or selective interpretations. The reluctance of domestic judiciaries to follow the international interpretation may shatter the promise of a unified global human rights interpretation. However, as the UK cases concerning the approach to immigration and asylum cases involving children, discussed above, demonstrate,<sup>127</sup> in those instances where the highest court in a jurisdiction has opted to use general comments to refine the extent of a right it is certain that lower courts will follow suit. Does this indicate broadening of the available interpretative tools or should these examples be treated as mere throw-away observations? The evolution of the international human rights system has occurred in many ways not conceived at its inception in 1948. The impact of general comments must be included in this observation and only time will reveal the true interpretative power of this form of treaty body jurisprudence.

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<sup>127</sup> See discussion of *ZH (Tanzania)*, *supra* note 64; *DS (Afghanistan)*, *supra* note 63; *Monsoor*, *supra* note 67.